

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF NEVADA

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4 ANGELA FERNANDES,

5 Plaintiff,

6 v.

8 MICHAEL J. ASTRUE,
 9 Commissioner of Social Security

10 Defendants.

3:10-cv-00441-LRH-VPC

**REPORT AND RECOMMENDATION
 OF U.S. MAGISTRATE JUDGE**

March 21, 2012

12 This Report and Recommendation is made to the Honorable Larry R. Hicks, United States
 13 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
 14 § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Plaintiff Angela Fernandes filed a
 15 motion for remand seeking review of her claim in light of new evidence submitted to the court
 16 (#21).¹ Defendant Commissioner opposed the motion and filed a cross-motion to affirm the
 17 Commissioner's final decision (#19). Plaintiff replied (#22).² After a thorough review, the court
 18 recommends that plaintiff's motion (#21) be denied and that defendant's motion (#19) be granted.

19 **I. ADMINISTRATIVE PROCEEDINGS**

20 On March 16, 2007, *pro se* plaintiff Angela Fernandes ("plaintiff") filed an application for
 21 Social Security Disability Insurance Benefits under Title II of the Social Security Act and on June
 22 9, 2008, plaintiff filed an application for Supplemental Security Income under Title XVI of the Act
 23 (AR 59, 106). Plaintiff alleged disability based on a loss of hearing, possible lupus, a rash on her
 24

25 ¹ Refers to the court's docket numbers. Plaintiff originally sent a one-page letter and
 26 approximately one-hundred-and-twenty-five pages of other materials to the Office of the U.S. Attorney.
 After the court's minute order (#20), plaintiff filed this document with the Clerk of Court (#21).

27 ² Plaintiff filed a document styled "Response to minutes of the court" (#22) which appears
 to be a reply to defendant's motion.

1 chest, back, and face, shortness of breath, fatigue, pain in her knees and legs, and headaches. *Id.* at
 2 134. The Commissioner denied plaintiff's claim initially and on reconsideration. *Id.* at 63-66, 71.
 3 On March 10, 2009, plaintiff and her attorney, Christopher Van Dyck, appeared at a hearing before
 4 Administrative Law Judge ("ALJ") Robert Tronvig, Jr. *Id.* at 19. The ALJ filed a written opinion
 5 on September 9, 2009, in which he upheld the denial of plaintiff's claims. *Id.* at 9-16. Plaintiff
 6 requested administrative review on September 9, 2009, and the Appeals Council denied review on
 7 May 14, 2010, making the ALJ's decision final. *Id.* at 1-3. Having exhausted all administrative
 8 remedies, plaintiff filed a complaint for judicial review on August 23, 2010 (#4).³

9 II. BACKGROUND

10 Plaintiff was forty-seven years old at the time of her hearing before ALJ Tronvig (AR 130).
 11 Plaintiff's past relevant employment includes work as a cashier, child care provider, key person at
 12 a casino, and clothing inspector. *Id.* at 135-36. Plaintiff alleges that she became disabled on
 13 December 13, 2006. *Id.* at 107, 130.

14 ALJ Tronvig found plaintiff "not disabled" because he determined that plaintiff has the
 15 "residual functional capacity to perform light work." *Id.* at 12. Specifically, the ALJ made the
 16 following findings:

- 17 1. The claimant meets the insured status requirements of the
 18 Social Security Act through December 31, 2010.
- 19 2. The claimant has not engaged in substantial gainful
 20 employment since December 13, 2006, the alleged onset date
 (20 CFR 404.1571 *et seq.* and 416.971 *et seq.*).
- 21 3. The claimant has the following severe impairments: hearing
 22 loss, visual loss of the right eye due to cataract, chronic knee
 23 pain bilaterally, chronic dermatitis, hypothyroidism, lower
 back strain, intermittent fatigue, and headaches (20 CFR
 404.1520(c) and 416.920(c)).
- 24 4. The claimant does not have an impairment or combination of
 25 impairments that meets or medically equals one of the listed
 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20
 CFR 404.1525, 404.1526, 416.925 and 416.926).
- 26 5. After careful consideration of the entire record, the
 27

³ The court previously dismissed defendants Tronvig and Dowgiello from this action (#13).

undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except that the claimant has postural limitations that preclude more than frequent balancing, occasional climbing of ramps, stairs, ladders, ropes and scaffolds, and occasional stooping, kneeling, crouching and crawling; only occasional overhead reaching; and environmental limitations that preclude working in hazardous work areas and very loud work environments; working in concentrated exposure to extreme cold and extreme heat; and working in even moderate exposure to hazards of machinery and heights.

6. The claimant is capable of performing past relevant work as a child care provider, clothing inspector, and cashier. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565 and 416.965).

7. The claimant has not been under a disability, as defined in the Social Security Act, from December 13, 2006, through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

Id. at 11-16.

III. STANDARD OF REVIEW

The court must uphold the decision of an ALJ if the ALJ properly applied the correct legal standards and his findings of fact are supported by substantial evidence in the record. *See Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); 42 U.S.C. § 405(g). "Substantial evidence" has been defined as "relevant evidence which a reasonable person might accept as adequate to support a conclusion." *Matthews v. Shalala*, 10 F.3d 678, 679 (9th Cir. 1993); *see also Richardson v. Perales*, 402 U.S. 389, 401 (1971). Substantial evidence is more than a mere scintilla but less than a preponderance. *See Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997), citing *Smolen*, 80 F.3d at 1279. "To determine whether substantial evidence exists [the court must] look at the record as a whole, considering both evidence that supports and undermines the ALJ's findings. However, if the evidence is susceptible of more than one rational interpretation, the decision of the ALJ must be upheld." *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995) (citations omitted). The ALJ alone is responsible for determining credibility and resolving ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

The Social Security Administration defines disability as the "inability to engage in any

1 substantial gainful activity by reason of any medically determinable physical or mental impairment
 2 which . . . has lasted or can be expected to last for a continuous period of not less than 12 months.”
 3 42 U.S.C. § 423(d)(1)(A). A claimant is considered disabled “only if his physical or mental
 4 impairment or impairments are of such severity that he is not only unable to do his previous work
 5 but cannot . . . engage in any other kind of substantial gainful work which exists in the national
 6 economy.” 42 U.S.C. § 423(d)(2)(A).

7 Pursuant to the Social Security Act, the Secretary has adopted regulations which establish
 8 a formalized, five-step sequential evaluation process to determine whether a claimant is disabled.
 9 See 20 C.F.R. § 404.1520. The ALJ considers: (1) whether the person is engaging in substantial
 10 gainful activity; (2) the severity of the alleged impairment; (3) whether the impairment meets or
 11 equals a listed impairment and meets the duration requirement; (4) whether the individual is capable
 12 of doing work he or she has done in the past; and (5) whether the impairment prevents the person
 13 from doing any other work. *Id.* If at any point in the five-step inquiry it is determined that a
 14 claimant is or is not disabled, further review is unnecessary.

15 III. ANALYSIS

16 Plaintiff requests that the court consider new evidence and in light of this evidence remand
 17 her case (#21). Defendant believes that plaintiff fails to demonstrate the relevance of the new
 18 evidence and does not offer good cause for why she did not submit the evidence earlier (#19).

19 A. New Evidence

20 To justify remand in light of new and material evidence, a plaintiff must show that there is:
 21 (1) new evidence that is material, and (2) good cause for having failed to provide that evidence
 22 earlier. *Mayes v. Massanri*, 276 F.3d 453, 462 (9th Cir. 2001); see 42 U.S.C. § 405(g). To meet the
 23 materiality standard, the “new or additional evidence offered must bear directly and substantially
 24 on the matter in dispute.” *Mayes*, 276 F.3d at 462 (quoting *Ward v. Schweiker*, 686 F.2d 762, 764
 25 (9th Cir. 1982)). A plaintiff must also demonstrate that there is a “reasonable possibility that the
 26 new evidence would have changed the outcome of the administrative hearing.” *Id.* (citation and
 27 quotation omitted). Further, “[a] claimant does not meet the good cause requirement by merely

1 obtaining a more favorable report once his or her claim has been denied. . . . the claimant must
 2 demonstrate that the new evidence was unavailable earlier.” *Mayes*, 276 F.3d at 463. Absent an
 3 explanation, failure of an attorney to submit information related to the condition in question during
 4 the hearing does not establish good cause. *Sanchez v. Sec’y of Health & Human Servs.*, 812 F.2d
 5 509, 512 (9th Cir. 1987) (“Although the reports were not prepared until after the Secretary rendered
 6 a final decision, [plaintiff’s] attorney was aware of [plaintiff’s condition] at the time of the hearing.
 7 [Plaintiff] offers no explanation for his failure to request . . . evaluation . . . at or before the
 8 hearing.”)

9 After the Appeals Council declined to vacate the ALJ’s September 9, 2009 decision (AR
 10 1-3), plaintiff filed the instant motion with the court to remand the ALJ’s decision based on new
 11 medical evidence (#21). Plaintiff’s motion consists of a single-paragraph letter signed by plaintiff,
 12 accompanied by approximately one-hundred-and-twenty-five pages of additional medical materials.
 13 *Id.* The additional evidence consists of progress notes from treating physician Derek Mito, and
 14 physician’s assistant Scott Stimson, handwritten rheumatology treatment notes, and associated
 15 laboratory orders and test results. *Id.* at 21-127. Plaintiff also submitted a psychiatric evaluation
 16 and psychiatric treatment notes. *Id.* at 1-20. Plaintiff’s one-paragraph letter does not provide the
 17 court with any detail regarding why the court should review this additional evidence and why she
 18 did not submit this evidence during her administrative proceedings.

19 Plaintiff bears the burden of satisfying the two-part *Mayes* test by providing the court with
 20 information regarding how the new evidence “bear[s] directly and substantially on the matter in
 21 dispute” and an explanation for why the evidence was previously unavailable. *Mayes*, 276 F.3d at
 22 462. Plaintiff explains that these updated medical records “show that [she is] still receiving
 23 treatment for [her] same ongoing pain” (#21, p. 1). Plaintiff provides no facts to support her
 24 submission of new evidence and the court is unwilling to speculate about the materiality this
 25 evidence.⁴ Plaintiff has failed to show that the new evidence is material to and probative of her
 26

27 ⁴ In its cross motion to affirm the Commissioner’s decision, defendant addresses the materiality of each piece of evidence proffered by plaintiff. However, the court does not reach these arguments because plaintiff fails to meet her burden of proof because she does not provide the court with

1 condition as it existed at the time at issue. A plaintiff must demonstrate that “there is a reasonable
 2 possibility that the new evidence would have changed the outcome of the [Commissioner’s]
 3 determination had it been before him.” *Booz v. Secretary of Health & Human Servs.*, 734 F.2d
 4 1378, 1380 (9th Cir. 1984) (quoting 42 U.S.C. § 405(g)); *see also Van v. Barnhart*, 483 F.3d 600,
 5 605 & n.4 (9th Cir. 2007). The ALJ found that plaintiff had the residual functional capacity to
 6 perform light work and to perform past work as a child care provider, clothing inspector, and
 7 cashier (AR 12, 15). Plaintiff has not demonstrated a reasonable possibility that this new evidence
 8 would have changed the outcome of the administrative proceeding. Further, even if the court did
 9 attempt to guess about the meaning of the evidence provided, plaintiff’s motion fails because she
 10 did not provide good cause for the delay in supplying this information to the ALJ.

11 Plaintiff does not show “that there is good cause for the failure to incorporate such evidence
 12 into the record in a prior proceeding.” *Booz*, 734 F.2d at 1380.⁵ An attorney represented plaintiff
 13 at the hearing and he summarized medical evidence for the ALJ (AR 42). Absent an explanation,
 14 failure of an attorney to submit information related to the condition in question during the hearing
 15 does not establish good cause. *Sanchez*, 812 F.2d 509, 512 (“Although the reports were not
 16 prepared until after the Secretary rendered a final decision, [plaintiff’s] attorney was aware of
 17 [plaintiff’s condition] at the time of the hearing. [Plaintiff] offers no explanation for his failure to
 18 request . . . evaluation . . . at or before the hearing.”). Although this new medical evidence was not
 19 prepared until after the ALJ issued a final decision, plaintiff could have sought to obtain this
 20 evidence during her proceedings. Further, plaintiff could have submitted this new evidence to the
 21 Appeals Council. As defendant argues, a large portion of the new medical evidence pre-dates the
 22 Appeals Council’s May 14, 2010 denial of review. Plaintiff offers no explanation for her failure
 23 to present this evidence at or before the hearing or to the Appeals Council for review. *Allen v.*
 24

25 facts to support her submission of new evidence and the court is unwilling to speculate about the materiality
 26 of the new evidence

27 ⁵ To the extent plaintiff argues that the evidence shows a worsening of her condition, the evidence is not relevant to the period at issue and should be disregarded. *See Flaten v. Secretary of Health & Human Services*, 44 F.3d 1453, 1460 (9th Cir. 1995).

1 *Secretary of Health & Human Serv.*, 726 F.2d 1470, 1473 (9th Cir. 1984). Plaintiff solely argues
 2 that she “was not able to hear the proceedings and therefore unable to respond appropriately and
 3 offer information about [her] conditions” (#21, p. 1). However, during her hearing, plaintiff stated
 4 that she could hear the ALJ’s voice and could read his lips as well (AR 21-22). It is not clear why
 5 this would have prevented plaintiff and her attorney from presenting relevant medical evidence.
 6 Moreover, “to demonstrate good cause, the claimant must demonstrate that the new evidence was
 7 unavailable earlier.” *Mayes*, 276 F.3d at 463. Plaintiff has failed to satisfy the good cause
 8 requirement.

9 IV. CONCLUSION

10 Based on the foregoing, the court concludes that plaintiff fails to demonstrate the materiality
 11 of the evidence she seeks to introduce as grounds for reversal or remand. Additionally, plaintiff
 12 does not have good cause for failure to introduce this evidence earlier. Therefore, plaintiff’s motion
 13 for remand (#21) should be **DENIED** and defendant’s cross motion to affirm the Commissioner’s
 14 decision (#19) should be **GRANTED**.⁶

15 The parties are advised:

16 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
 17 the parties may file specific written objections to this report and recommendation within fourteen
 18 days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and
 19 Recommendation” and should be accompanied by points and authorities for consideration by the
 20 District Court.

21 2. This report and recommendation is not an appealable order and any notice of appeal
 22 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s judgment.

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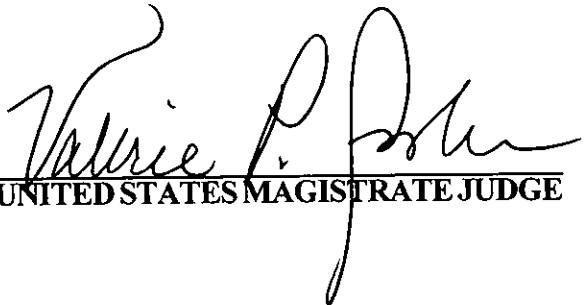
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 27 ⁶ Plaintiff does not argue in her motion (#21) that the Commissioner’s decision was unsupported by substantial evidence or based upon reversible legal error.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that plaintiff's motion for reversal (#21) be DENIED and defendant's cross-motion to affirm (#19) be GRANTED.

DATED: March 21, 2012.


UNITED STATES MAGISTRATE JUDGE